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MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-158

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE and EDWARD J. BOLING,
Petitioners,

v.

DR. RAJ P. SONI,
Respondent.

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

In their PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, Petitioners presented to this honorable Court:

QUESTION 4

DOES THE PROVISION OF THE CHARTER OF THE UNIVERSITY OF TENNESSEE THAT THE UNIVERSITY MAY "SUE AND BE SUED" CONSTITUTE A WAIVER OF THE UNIVERSITY'S ELEVENTH AMENDMENT IMMUNITY AS A STATE AGENCY, SUCH THAT THE PROP-

ERTY OF THE UNIVERSITY IS SUBJECT TO DIVESTITURE THROUGH EXERCISE OF JUDICIAL POWER? *Petition*, p. 17.

Petitioners contended, and contend, that there is a conflict between the Tennessee Supreme Court and the Sixth Circuit in an interpretation of Tennessee law in answering this question. *Ibid.*

On December 15, 1975, the Tennessee Supreme Court issued an opinion which lucidly reaffirms that conflict. *Terry Robert Riddle v. City of Johnson City*, ___ Tenn. ___ (1975). Since the *Riddle* opinion was issued subsequent to the date on which Petitioners filed their PETITION FOR A WRIT OF CERTIORARI (July 28, 1975), Petitioners file this SUPPLEMENTAL BRIEF for the purpose of bringing the *Riddle* opinion to this Court's attention (a copy of the opinion is included herein as Appendix A).

In the *Riddle* case, the Tennessee Supreme Court stated:

> "The appellant argues that Chapter 189 of the Private Acts of Tennessee, providing that the City of Johnson City '. . . shall sue and be sued . . .' amounts to a waiver of the governmental immunity of the City. Appellant concedes that this question was settled by the Tennessee Court of Appeals, with certiorari being denied, in *McMahon v. Baroness Erlanger Hospital*, 43 Tenn. App. 128, 306 S.W.2d 41, but it is argued that this Court should now disagree with the holding in that case and reverse the instant case. In further support of this argument appellant relies on the Federal Court decision of *Soni v. Board of Trustees*, Sixth Circuit for the United States, No. 74-1602, in which case the Court held that the legislature had

> waived the University's immunity when it enacted the 1807 charter of the University of Tennessee by authorizing the University to 'sue and be sued.' Certainly as appellant concedes ***Tennessee is not bound to adopt nor follow the Federal opinion.***" (pp. 3-4) (Emphasis added.)

Petitioners respectfully contend that the phrase "sue and be sued" contained in the Charter of The University of Tennessee cannot have two directly conflicting meanings, and that the Federal Court was bound to follow the State's Supreme Court in its interpretation of state law. The conflict thus existing between the Tennessee Supreme Court and the Sixth Circuit Court of Appeals should be resolved by this Court.

Should this Court decline to resolve the conflict, petitioners, the governing board and president of The University of Tennessee, remain subject to the extremes of either *no* monetary liability or ***unlimited*** monetary liability in future lawsuits depending to a large extent on the whim of prospective plaintiffs as to which Court they choose to litigate in.

As urged in their PETITION FOR A WRIT OF CERTIORARI, page 19, Petitioners ask that certiorari be granted in order to permit thorough briefing and argument of this question by both parties in order to resolve a conflict which threatens a most serious financial impact on the University of Tennessee and the State of Tennessee.

Respectfully submitted,

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Attorneys for Petitioners

BLEED THROUGH

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

[fol. 1]

TERRY ROBERT RIDDLE,
Appellant

VS

CITY OF JOHNSON CITY,
Appellee

WASHINGTON COUNTY CIRCUIT
JOHNSON CITY LAW COURT

Honorable Walter B. Garland, Judge

For Appellant:

Dan M. Laws
Elizabethton, Tennessee

Rowland E. Verran
Johnson City, Tennessee

For Appellee:

James H. Epps, III
Howell H. Sherrod, Jr.
Johnson City, Tennessee

AFFIRMED

Oris D. Hyder,
Special Justice

[fol. 2]

OPINION

(Filed December 15, 1975)

Appellant was employed in the sewer department of the defendant City and his action was for damages he alleges he sustained when he was thrown from a city vehicle in route between jobs. Upon motion of the City the trial judge dismissed the complaint for failure to state a claim upon which relief could be granted. The case is here on a direct appeal.

Appellant argues that this action may be maintained on three separate theories: (1) the transporting of sewer employees between jobs in city owned and operated vehicles is a proprietary function; (2) the legislature has

removed the City's immunity on suits brought by its employees who are in a master-servant relationship by enactment of the Occupational Safety and Health Act of 1972, T.C.A. 50-501, et seq.; and (3) that the legislature, in enacting Article I, Section 2 of Chapter 189 of the Private Acts of 1939, waived the City's immunity when it allowed the City of Johnson City to "sue and be sued, implead and be impleaded in all courts of law and equity and in all actions whatsoever." Subsequently appellant filed a supplemental assignment of errors and brief contending that "If the City of Johnson City is immune from suits of this nature, then the doctrine of immunity should be abrogated by the Court."

While the appellant does not contend that the operation of the sewer department of the City is a proprietary function, he does argue that the transporting of sewer employees between jobs constitutes a proprietary rather than a governmental function. He cites the New Jersey holding that a municipality conducting the business of operating a sewerage plant for profit was not carrying on a governmental function, and was, therefore, liable for an injury caused by the negligent operation of one of its trucks while being used in such business. *Morgenwick v. Egg Harbor City* (1929) 106 N.J.L. 141, 147 A. 468. He also relies on a holding by the Tennessee Court of Appeals, Middle Division, that allowed an employee of a street patching crew to recover from the City of Nashville for personal injuries sustained when the employee was thrown from the open bed of a truck being used to transport the employee from one street job to another. *Urmann v. City of Nashville*, 44 Tenn. App. 36, 311 S.W.2d 618 (1957). These cases are distinguishable from the facts in the instant case. In *Morgenwick* the sewer-
[fol. 3] age plant and the use of its vehicle were found

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to be proprietary, and not governmental. In *Urmann* the Court found the function being performed by the City was proprietary in that the entire factual situation was related to street maintenance and repair.

Tennessee, following the common law, has held that a municipality is liable in tort only if acting in a private or proprietary capacity. A municipality is immune from suit in tort if acting in its governmental capacity. *City of Nashville v. Burns*, 131 Tenn. 381, 174 S.W. 1111; *Vaughn v. City of Alcoa*, 194 Tenn. 449, 251 S.W.2d 304. Also the establishment, maintenance and operation of a sewer system by a city is a governmental function in Tennessee. *Patterson v. City of Chattanooga*, 192 Tenn. 267, 241 S.W.2d 291; *Campbell v. City of Knoxville*, 505 S.W.2d 710.

In his complaint the appellant says that ". . . to perform his duties in various parts of the City . . . the defendant furnished to the plaintiff as part of his employment the necessary transportation in which to travel to various sections of the City of Johnson City, Tennessee to perform his duties." This falls within the purpose and character of a method of operation which is performed for the common good of all and not for the special benefit or profit of the corporate entity.

The Tennessee Occupational Safety and Health Act of 1972 sets out the rights and duties of employees in relation to said Act. No cause of action is established on behalf of any employee in the form of a civil action for damages against the employer. We can imply no cause of action growing out of legislative acts unless the legislature clearly and unmistakably discloses an intent to permit such action. *Scates v. Board of Commissioners*

of Union City, 196 Tenn. 274, 265 S.W.2d 563. No such intent is disclosed in the Tennessee Occupational Safety and Health Act of 1972.

The appellant argues that Chapter 189 of the Private Acts of Tennessee, providing that the City of Johnson City ". . . shall sue and be sued . . ." amounts to a waiver of the governmental immunity of the City. Appellant concedes that this question was settled by the Tennessee Court of Appeals, with certiorari being denied, in *McMahon v. Baroness Erlanger Hospital*, 43 Tenn. App. 128, 306 S.W.2d 41, but it is argued that this Court should now disagree with the holding in that case and re-
[fol. 4] verse the instant case. In further support of this argument appellant relies on the Federal Court decision of *Soni v. Board of Trustees*, Sixth Circuit Court for the United States, No. 74-1602, in which case the Court held that the legislature had waived the University's immunity when it enacted the 1807 charter of the University of Tennessee by authorizing the University to "sue and be sued." Certainly as appellant concedes Tennessee is not bound to adopt nor follow the Federal opinion.

In 1973 the General Assembly of Tennessee enacted the Governmental Tort Liability Act, T.C.A. Sec. 23-3301 et seq. T.C.A. 23-3308 expressly removes immunity for injury from negligent operation of motor vehicles. As originally enacted a local political body had the option to exempt itself under certain conditions. We assume the City of Johnson City to be exempt pursuant to Section 23-3303 of the Code by the failure of appellant to raise the issue in response to the City's plea of governmental immunity. In *Johnson v. Oman Construction Company*, 519 S.W.2d 782 at page 786 (Tenn. 1975) we considered this statute and stated:

"We do not regard this statute as dealing with the subject in a complete or comprehensive manner. We are reluctant to take judicial action in this area, however, without giving the General Assembly an opportunity to establish a comprehensive and uniform tort claims procedure governing suits against cities, counties and other political subdivisions or their agencies in the duly constituted courts of the State."

Subsequent to the *Johnson* decision, the General Assembly enacted Chapter 252 of the Public Acts of 1975 which removed the option of the local government to exempt itself from the Government Tort Liability Act. Chapter 252 provides that the governmental units that have exempted themselves from the Act would automatically be subject to the provisions of that Act for all claims or actions arising after January 1, 1976. After that date, this category of tort claims will be stripped of the shield of governmental immunity in all of the counties and cities of this State.

The legislature has given the local governments what it considers to be appropriate time to adjust their procedures and to take adequate steps to protect against the consequences of a change in the law of governmental immunity. It would be inappropriate for us to judicially accelerate the tort liability of counties and cities in the present and prospective state of the law.

[fol. 5] The trial judge was correct in holding that under existing Tennessee law the appellant failed to state a claim upon which relief could be granted. His Order of Dismissal is affirmed. The costs are adjudged against appellant.

/s/ Oris D. Hyder

Oris D. Hyder, Special Justice.

Fones, C.J.; Harbison and Cooper, JJ., concur

Henry, J., dissenting

Appendix A

IN THE SUPREME COURT OF TENNESSEE

AT

[fol. 1] **KNOXVILLE**

TERRY ROBERT RIDDLE
VS
CITY OF JOHNSON CITY

WASHINGTON LAW

DISSENTING OPINION

(Filed December 15, 1975)

I respectfully dissent. My reasons for being unalterably opposed to the doctrine of governmental immunity are fully set forth in *Cooper v. Rutherford County*, ___ S.W.2d ___ (Tenn. 1975) and need not be repeated here.

This case, however, raises other questions which I shall now address.

Chapter 189 of the Private Acts of 1939 contains the Charter of the City of Johnson City. Section 2, provides, in pertinent part, that it

> (S)hall *sue and be sued*, *implead and be impleaded* in all courts of law and equity, and *in all actions whatsoever* . . .
> (Emphasis supplied)

The majority, relying upon *McMahon v. Baroness Erlanger Hospital*, 43 Tenn. App. 128, 306
[fol. 2] S.W.2d 41 (1957), holds by implication that this Charter provision does not constitute a waiver of governmental immunity.

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I agree that *McMahon* so holds – without citing any authority, without giving any reasons and without any comment except that "(t)his phraseology is common to most charters of municipal as well as private corporations."

This reasoning completely overlooks the fact that a holding that the city may not be sued is tantamount to a holding that the city may not sue. A decent regard for the plain provisions of the charter demands this conclusion. Tennessee municipalities have only such powers as are conferred by the Legislature. The same charter provision that authorized cities to sue authorizes them to be sued and to be impleaded in all actions whatsoever. These rights are inseparable. If the one exists, so must the other. I am unwilling to nullify the Charter of Johnson City by stripping the city of its right to sue or by holding that it may not be sued. Such a holding is in the very teeth of express legislative conference of powers, and, if carried to its logical conclusion will deal the cities of Tennessee a body blow in that their right to sue will be discontinued, with devastating results.

Appellants rely upon *Soni v. Board of Trustees of University of Tennessee*, 513 F.2d 347 (6 Cir. 1975). This was a suit against the University of Tennessee whose charter provides that the Trustees

> (M)ay sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere.
>
> 513 F.2d at 352

[fol. 3] The Court, speaking through Chief Judge Phillips described this as an "unrestricted right to sue and be sued," and designated it as "sweeping" and "general" consent.

The majority opinion states, with reference to *Soni* that "Tennessee is not bound to adopt nor to follow the Federal opinion." I agree that Federal decisions are not binding. But Tennessee is bound to adopt and follow any decision that announces a rule of law that is demanded by the justice of the cause and is dictated by the promptings of fundamental fairness. Better to follow the Federal Courts than to fall into the quagmire created by our own courts as we attempt to perpetuate doctrines and defenses that are foreign to contemporary American jurisprudence.

HENRY, J.